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IN THE

Supreme Court of the United States

October Term, 1939.

No. 405

MRS. W. G. (MARY) NOLL,
Petitioner,

vs.

MRS. BESSIE MIFFLIN HUNT,
Adminstratrix of the Estate of Robert Morris Mifflin, Deceased,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

LEE DOUGLAS,
WILLIAM HOWARD EWING,
Nashville, Tennessee,
Solicitors for Petitioner.

BAIRD-WARD—NASHVILLE

SUBJECT INDEX

PAGE

Petition for Writ of Certiorari 1
Summary and Short Statement of Matter Involved 2
(a) The Pleadings and Action of the District Court 2
(b) The Record in the Circuit Court of Appeals, and Its Action 5
(c) Petitioner's Contentions Briefly Stated 6
"CONSTRUCTIVE SERVICE STATUTES" 6, 7, 8
(a) The Highway Statute 6
(b) The Foreign Administration Statute 7
Reasons Relied on for Allowance of the Writ 11
Prayer for Writ 13
Brief in Support of Petition for Certiorari 15
I. The Opinions of the Courts Below 15
II. Jurisdiction 15
III. Statement of the Case 16
IV. Specifications or Assignments of Error 16
Argument 19
Assignments Nos. I and II 19
Assignment No. III 21
Assignment No. IV 37
Assignment No. V 49
The Statutes Are Unconstitutional 39
Conclusion 50

Table of Cases Cited

PAGE

Bamberger v. Citizens St. Ry., 95 Tenn., 18 32
Bate Refrigeration Co. v. Sulzberger, 157 U. S., 1, 39 L. Ed., 601 30
Blake v. McClung, 172 U. S., 239, 43 L. Ed., 432 41
Boureston v. Boureston, 285 N. W., 426 42
Charles v. Fischer Baking Co., 187 Atlantic, 175 28
Cofred v. Gartner, 7 L. R. A., 512 43
Cole v. Cunningham, 133 U. S., 107, 33 L. Ed., 538, 542 42
Concordia Fire Ins. Co. v. Illinois, 292 U. S., 535, 547; 78 L. Ed., 1411, 1418 ..... 38, 39
C field v. Coryell, 4 Wash. C. C., 371, 380, 381, Fed. Cas. No. 3 41
Davidson-Benedict Co. v. Severson, 109 Tenn., 572 ..... 34, 36
Dowling v. Winters, 181 S. E., 751 29
Duehay v. Acacia Mut. Life Ins. Co., 105 Fed. (2d), 768, 776. 43
Erving v. Chicago & N. W. Ry. Co., 214 N. W., 12 43
Fawcett v. R. R., 113 Tenn., 246, 81 S. W., 839 24
Folsom v. U. S., 160 U. S., 121, 40 L. Ed., 363 29
Hartley v. Utah Construction Co., 106 Fed. (2d), 953, ... 10, 27
Herrman v. Franklin Ice Cream Co., 208 N. W., 141 43
Hess v. Pawlowski, 274 U. S., 352, 71 L. Ed., 1091 40
Ledin v. Davidson, 216 Wis., 96 A. L. R., 589 28
Mann v. Smith, 158 Tenn., 463 18
Mason v. Boone Co., 16 Fed. Cas. No. 9232, p. 1012 42
Memphis St. Ry. v. Bobo, 232 Fed., 709 ..... 10, 23
Memphis St. Ry. v. Moore, 243 U. S., 299 ..... 18, 22, 23, 30, 48
McCreary v. N., C. & St. L. Ry., 161 Tenn., 691, 34 S. W. (2d), 210 32
Morrow v. Asher, 55 Fed. (2d), 365 28
Pinkerton v. Fox, 129 S. W. (2d), 514 26
Producers & Refiners Corp. v. Ill. Cent. R. Co., 168 Tenn., 1 .. 26
Railroad v. Maxwell, 113 Tenn., 464 ..... 18, 22, 23, 24, 30, 33
Railway Co. v. Lilly, 90 Tenn., 564 ..... 31, 32
Riggs v. Schneider's Executor, 279 Ky., 361, 130 S. W. (2d), 816 28
Sheehan v. Lewis, 260 N. W., 633 42

PAGE

Slaughter-House Cases, 16 Wall., 36, 76; 21 L. Ed., 394, 408.. 41
Southern Ry. v. Thompson, 109 Tenn., 343..... 24
Strange v. Board of Com'rs. of Grant Co., 91 N. E., 242, 506; 173 Ind., 640 47
U. S. v. Detroit First Nat. Bank, 234 U. S., 245..... 29
U. S. v. Plowman, 216 U. S., 372..... 29
U. S. v. Wheeler, 254 U. S., 281, 293; 65 L. Ed., 270, 273.... 41
Ward v. The State of Pennsylvania, 12 Wall., 418..... 48
Whaley v. Catlett, 103 Tenn., 347, 355.....34, 36
Whitson, Admr. v. Tenn. Cent. Ry., 163 Tenn., 35.....10, 32, 36
Williams v. Fears, 179 U. S., 270..... 48
Wood v. White, 97 Fed. (2d), 646.....10, 26
Wuchter v. Pizzutti, 276 U. S., 13; 72 L. Ed., 446..... 41
Young v. Potter Title & Trust Co., 178 Atl., 177..... 29

Table of Texts and Statutes Cited

Blashfield's Cyclopedia of Automobile Law and Practice, Sec. 9514 29
Code of Tennessee, Section 8148.....4, 5, 7, 8, 9, 10, 11, 16, 17, 18, 19, 21, 22, 24, 25, 26, 33, 38, 40, 43, 44, 45
Code of Tennessee, Section 8149.....4, 5, 8, 9
Code of Tennessee, Section 8671.....3, 4, 6, 8, 11, 16, 17, 18, 20, 21, 22, 25, 26, 33, 38, 39, 40, 44, 45
Code of Tennessee, Sections 8672, 8673.....3, 4, 6, 7, 20
Code of Tennessee (Shannon's), Section 4025.....34, 35, 36
Code of Tennessee, Section 8236.....10, 31, 34, 35, 36
Constitution of the United States, Art. IV, Sec. 2, and Fourteenth Amendment 11, 18, 38, 41, 42, 46, 47
Corpus Juris Secundum, Vol. 16, p. 176, Sec. 83..... 39
Judicial Code, Sec. 240a..... 15
25 R. C. L., Sec. 217, p. 962..... 29
25 R. C. L., Sec. 282, pp. 1057, 1058.....9, 29
U. S. Code, Tit. 28, Sec. 347..... 15
Words and Phrases (2nd Series), Vol. 3, p. 1215..... 47

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vs.

MRS. BESSIE MIFFLIN HUNT,
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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable Charles Evans Hughes, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Mrs. W. G. (Mary) Noll, respectfully shows that:

I.

SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED.

(a) The Pleadings and Action of the District Court.

This is an action at law for damages in the amount of $25,000.00 originally brought in the Circuit Court of Davidson County, Tennessee, by respondent, Mrs. Bessie Mifflin Hunt, Foreign Administratrix of the Estate of Robert Morris Mifflin, deceased, against petitioner, Mrs. W. G. (Mary) Noll, for the alleged wrongful death of her intestate, the said Robert Morris Mifflin. The declaration alleged an automobile accident on the highways of Tennessee on or about November 4, 1934, in which there was a collision between an automobile driven by Robert Morris Mifflin and an automobile owned and operated by petitioner, Mrs. W. G. (Mary) Noll, of Quincy, Illinois, a nonresident of the State of Tennessee (R., 5). The declaration alleged that Mrs. Hunt was the mother and beneficiary, and respondent sought damages "for her use and benefit."

The case was seasonably removed to the United States District Court for the Middle District of Tennessee. The removal was on the ground of diversity of citizenship and amount involved. There was no objection to the removal on the part of respondent and no motion to remand (R., 3).

The suit was instituted by summons on the pauper's oath (R., 12). Personal service on said summons was never obtained upon petitioner, Mrs. Noll. Attempt was made to obtain service upon her by invoking the terms of Code

of Tennessee, Sections *8671, 8672,* and *8673, hereinafter set out.*

The Secretary of State made certificate on said summons that he had sent certified copy of same by registered mail to Mrs. Noll and received return receipt therefor from her (R., 7).

After the suit had been removed to the United States District Court, the defendant in said petition, Mrs. Noll (petitioner here) seasonably filed a plea in abatement to quash the service of process and abate the case (R., 9). This plea was amended without objection, and after it had been sustained as against respondent's motion to strike (R., 20), issue thereon was joined and a hearing had before the District Judge, sitting without the intervention of a jury, which was expressly waived (R., 23).

The plea in abatement challenged the jurisdiction of the Court and asserted that at the time the alleged cause of action arose, and at the time the suit was brought, respondent, Mrs. Bessie Mifflin Hunt, was both individually and as administratrix a nonresident of the State of Tennessee, and a citizen and resident of the State of Florida, and that, therefore, constructive service of process under Sections 8671, 8672 and 8673 of the Code of Tennessee, under which the summons in the case was issued and proceeded with, was void, and should be quashed (R., 9).

On the hearing on the plea in abatement, the District Judge, sitting without a jury, heard proof in open Court on the issue joined. Respondent, Mrs. Hunt, denied that

she was a citizen and resident of the State of Florida, and asserted that she was at the times aforesaid a resident of the State of Tennessee. After considering all the evidence, the District Judge was of opinion that the plea was sustained by the evidence, and found as a fact that on December 5, 1934 respondent, Mrs. Hunt, qualified as a foreign or nonresident administratrix in the County Court of Davidson County, Tennessee, under Sections 8148, 8149 of the Code of Tennessee (hereinafter set out), and brought the action as such nonresident administratrix of Robert Morris Mifflin, deceased (R., 23).

The Court also found as a fact that the respondent, on all of the times aforesaid, was *not* a resident of Tennessee, either individually or as such administratrix, and that as such administratrix, under applicable Tennessee law, she was not a resident of Tennessee (R., 24).

The District Court having found the above facts further ruled as a matter of law that Sections 8671 *et seq.* (Constructive Service statute) require that the plaintiff shall be a resident of Tennessee at the time the cause of action accrued, or at the time the suit was brought. The Court, therefore, was of opinion that said summons should be quashed and the suit dismissed, and he adjudged accordingly (R., 24).

At the time he sustained said plea in abatement, the District Judge handed down a written opinion which is made part of the record in this cause (R., 38-40).

(b) The Record in the Circuit Court of Appeals, and Its Action.

Thereafter the plaintiff below, Mrs. Bessie Mifflin Hunt, administratrix, filed petition for appeal to the Circuit Court of Appeals for the Sixth Circuit, on the pauper's oath, which was allowed over the objection of petitioner (R., 29).

The Bill of Exceptions (R., 31-33) states that the plaintiff below, Mrs. Hunt, was the mother of Robert Morris Mifflin, a resident of Tennessee, who died intestate, and that she qualified *as a foreign or nonresident administratrix* of his estate under Sections 8148, 8149 of the Code, and gave bond as such, and the Bill of Exceptions contains a certified copy of said Letters of Administration. The Bill of Exceptions also states that at the time the alleged cause of action arose on November 4, 1934, and at the time the suit was brought in the Circuit Court of Davidson County, on August 8, 1935, and at the time same was removed to the Federal Court, Mrs. Hunt was *not* a resident or citizen of the State of Tennessee, but *at all of such times was a nonresident of Tennessee,* and a resident and citizen of the State of Florida, and that she qualified as a *nonresident administratrix* of the State of Florida, and has been acting as such ever since; that petitioner at the times aforesaid, and ever since, has been a nonresident of the State of Tennessee and a resident and citizen of the State of Illinois.

The Circuit Court of Appeals for the Sixth Circuit, after hearing, handed down an opinion, reversing the District Court and remanding the cause for further proceedings consistent with said opinion (R., 44).

After this judgment, petitioner filed a petition for rehearing (R., 49), which was denied (R., 71), without opinion.

(c) Petitioner's Contentions Briefly Stated.

The statutes of Tennessee above referred to are both

"CONSTRUCTIVE SERVICE STATUTES."

(a) **"The Highway Statute."**

Code of Tennessee, Section 8671. "Owner, etc., of motor vehicle using highway submits to jurisdiction, how.—Any owner, chauffeur or operator of any motor vehicle that is not licensed under the laws of this state who shall make use of the privilege, hereby extended to nonresidents of the state, to operate such vehicle on highway or highways within the state, shall be deemed thereby to constitute the secretary of state of this state his agent for acceptance of service of process in any civil action brought by a resident of this state against him, arising out of any accident or injury occurring in this state in which such vehicle is involved. Such use of a highway shall be treated as an agreement on the part of said person that such service of process shall have the force and validity of personal service on him within the jurisdiction of this state and county of action."

Code of Tennessee, Section 8672. "Method of service.—Service of such process, under either of the two preceding sections, shall be made by lodging (by plaintiff or his attorney) the original summons and a copy, certified by the clerk of the court in which action is brought, with a fee of two dollars, with the secretary of state, who shall promptly send, postage

prepaid, the certified copy by registered return-receipt mail to the defendant, along with a written notice that service was so made."

Code of Tennessee, Section 8673. "Evidence of service.—The original process, indorsed as below, an affidavit of the secretary of state setting forth his compliance with the requirements of this law, and the return-receipt signed by, or duly in behalf of, the defendant, shall be attached together and sent to and filed by said clerk. There shall be indorsed on the original process by the secretary of state over his signature the date of his mailing the certified copy to the defendant and the date on which he received the return-receipt of the defendant; thereupon service on the defendant shall be consummate. An act of a deputy or regular assistant of the secretary of state in his behalf, hereunder, shall be deemed the equivalent of the act of the latter."

(b) **"The Foreign Administration Statute."**

Code of Tennessee, Section 8148. "Nonresident executor or administrator qualified here may be sued here by service of process on county court clerk.—Whenever a nonresident of the state qualifies in this state as the executor or adminstrator of a person dying in or leaving assets or property in this state, for the purpose of suing or being sued, he shall be deemed to have assented to be treated as a resident citizen of this state; and, in case it is desired by any citizen or resident of this state to sue said administrator or executor in his official capacity for any debt or demand, due or owing to any citizen or resident of this state, from his testator or intestate, then, in case of the inability of the officer in whose hands process is placed to find said administrator or executor in this state, no-

tice of said suit, served upon the clerk of the county court of the county wherein said party qualified as administrator or executor, shall be sufficient notice to bring said administrator or executor before the court issuing said process; provided that said clerk shall notify by United States registered return-receipt mail said executor or administrator of such notice having been served upon him."

Code of Tennessee, Section 8149. "Such executor or administrator shall give his address to county court clerk.—Said nonresident of the state, qualifying as executor or administrator as aforesaid, shall give to the clerk of the county court of the county in which he qualifies his address, and a letter so mailed to him at said address shall be sufficient notice, unless subsequently changed and notice accordingly given to said county court clerk, in which event such notice to the changed address, shall be sufficient."

The contention of petitioner was and is that under the terms of Code Section *8671 et seq.* the remedy is expressly limited to living residents of Tennessee, and that no administratrix, whether resident or nonresident, has any right to invoke the benefits of its provisions; that in any event the action in this case was not brought by a resident of Tennessee as provided by the statute; that it was brought by a nonresident, who was a nonresident administratrix, and that no personal service was obtained upon petitioner, a nonresident of Tennessee, and that constructive service under such state of facts was invalid when attempted under Code, Sections *8671 et seq., supra,* since said statute expressly limits its benefits to *civil actions brought* by *residents* of Tennessee; that the statute is plain and unambiguous, and

the Court cannot read into same the additional words "or his administrator or executor" which respondent, Mrs. Hunt, admits must be done to render the service valid; that the statute is in derogation of the common law and must be strictly construed, and cannot be added to or enlarged by judicial legislation.

It was also the contention of petitioner that Code, Sections *8148 et seq.*, must be strictly construed, since it likewise is a statute of the same character and nature, providing for constructive service of process, and permits suits by residents of Tennessee only.

It is petitioner's earnest insistence that the learned Circuit Court of Appeals for the Sixth Circuit, in an opinion by Hicks, Circuit Judge (R., 44), completely ignored the universal rule of law that the above statutes must be strictly construed, and gave to said statutes an erroneous construction. That not only was this construction erroneous, but it could not have been reached without a most liberal construction as against petitioner and in favor of respondent, Mrs. Hunt. This was error. It was a plain invasion of the legislative power, for the statutes are neither ambiguous nor obscure. Also the statutes must be strictly construed since they seek to confer authority in derogation of the common law, and attempt to provide a remedy—a method of constructive service wholly unknown to the common law. This rule of strict construction has been universally applied, and it has been applied to this particular statute (25 R. C. L., s. 282, pages 1057, 1058).

It is petitioner's insistence that this action of the Circuit Court of Appeals was in conflict with the decisions of an-

other Circuit Court of Appeals, to wit, *Wood* v. *White*, 97 Fed. (2d), 646, and *Hartley* v. *Utah Construction Co.*, 106 Fed. (2d), 953, as hereinafter pointed out. That the Circuit Court of Appeals for the Sixth Circuit in said opinion not only ignored the proper construction of this statute, and by the effect of its decision read into it words which the legislature did not provide, and which there is no reason to believe that it intended, but the Court of Appeals held, in arriving at this conclusion, that for the purposes of her suit as administratrix, respondent, Mrs. Hunt, must be treated as a citizen of Tennessee. That in assigning its reasons for this conclusion, the Circuit Court of Appeals erroneously construed decisions under an old statute of Tennessee which was repealed by the present Code (*Section 8236*), giving effect to the decisions of the Tennessee Supreme Court construing this old statute which did not, and could not, construe the new statute, and had no application thereto. At the same time, the Circuit Court of Appeals overlooked later decisions of the Supreme Court of Tennessee, which hold that where the sole beneficiary in a case of this character is the father or mother, *such a person is the real party in interest* (*Whitson, Admr.* v. *Tennessee Central Ry.*, 163 Tenn., 35). Furthermore the effect of the opinion of the Circuit Court of Appeals is that respondent, Mrs. Hunt, because she qualified as a nonresident administratrix in Tennessee is to be deemed and treated to be a resident citizen of Tennessee under Section 8148, although the Circuit Court of Appeals for the Sixth Circuit in *Memphis St. Ry.* v. *Bobo*, 232 Fed., 709, in construing this same statute of Tennessee, expressly held that said statute made

no attempt to convert an actual nonresident into a citizen of Tennessee.

Finally, it is petitioner's insistence that the interpretation of Section 8148 of the Code, as above set out, as shown by the decision of the Circuit Court of Appeals, renders said statute unconstitutional, in violation of Article IV, Section 2, of the Constitution of the United States, and the Fourteenth Amendment thereto, as hereinafter more fully shown; and Section 8671 of the Code is unconstitutional as applied by said Circuit Court of Appeals since by its terms it is expressly limited to a civil action brought by a resident of Tennessee, and thereby contravenes Section 2 of Article IV of the Constitution of the United States, and the Fourteenth Amendment thereto, as hereinafter more fully pointed out.

II.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

A.

1. The decision of the Circuit Court of Appeals is in conflict with the applicable decisions of this Court, and is in conflict with other Circuit Courts of Appeal, and with its own previous decisions in construing the same statute of Tennessee, to wit, Code Section 8148, and the Supreme Court should entertain this *certiorari* so that by its opinion confusion of procedure under this statute and Code Section 8671 can be avoided in the future, and both citizens of Tennessee and citizens of other states be certain of their rights as litigants.

2. The decision of the Circuit Court of Appeals decides an important question of local law in a way that is in conflict with applicable local decisions, giving an erroneous interpretation to such local decisions and an interpretation which renders the statutes in contravention of the Constitution of the United States.

B. This is a tort action for negligence of which there are a great number in the State of Tennessee, in all the Federal Courts, and which in fact is an important branch of litigation that is constantly arising in Courts of all types throughout the country.

Is a nonresident and citizen of a distant state, lawfully using the highways of Tennessee, to be denied the constitutional and common law right of personal service of process because the Federal Court by judicial legislation writes into an unambiguous statute of Tennessee additional words, when by all the authorities said statute is to be strictly construed against such action?

Can such a nonresident of Tennessee be deprived of his common law and constitutional right of personal service of process by the judicial fiction that a nonresident becomes a resident by qualifying as a nonresident administrator in Tennessee? And when such nonresident defendant is prohibited by the very terms of the nonresident administration statute from bringing any suit against such nonresident administrator, can it be said that the interpretation in the instant opinion of the Circuit Court of Appeals results otherwise than in the unconstitutionality of the Act?

These are questions raised by the opinion of the Circuit Court of Appeals itself, and it is respectfully submitted that they should be decided by the Supreme Court in order that litigants may know their rights, and, as we submit, be declared to *have* their rights, under the Constitution of the United States. These questions are quite apart from, and in addition to, the affirmative legal propositions upon which petitioner was held to be entitled to relief by the learned District Judge, all of which, with due deference to the Circuit Court of Appeals, was ignored in its opinion.

The questions involved here are important and fundamental matters of general and procedural law and the Constitution of the United States. The case involves questions of general interest, and has the possibility of being of primary and fundamental importance in a large number of tort actions, based on negligence, instituted in the State of Tennessee or any other Federal Court.

There is presented herewith a supporting brief showing more fully petitioner's views and contentions, and the law applicable thereto.

Wherefore, your petitioner prays that a writ of *certiorari* issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the United States Circuit Court of Appeals for the Sixth Circuit had in the case numbered and entitled on its docket, No. 8138, *Mrs. Bessie Mifflin Hunt, Administrator of the Estate of Robert Morris Mifflin, Deceased, Appellant,* v.

Mrs. W. G. (Mary) Noll, Appellee, to the end that this cause may be reviewed and determined by the Court as provided for by the statutes of the United States; and that said judgment herein of said United States Circuit Court of Appeals for the Sixth Circuit be reversed by this Court, and for such other and further relief as to this Court may seem meet and proper.

LEE DOUGLAS and
WILLIAM HOWARD EWING,
Counsel for Petitioner.